

To: GACEC Policy and Law; SCPD

Date: 3/10/2020

From: Disabilities Law Program

Re: March 2020 Policy and Law Memo

Proposed Regulations

1. Proposed Department of Elections Regulation Regarding Procedures for Addressing Post-Election Voting Machine Audit Discrepancies, 23 Del. Register of Regulations 727 (March 1, 2020)

The Department of Elections (Department), pursuant to 15 **Del.C.** §5012A(f), is proposing to enact a new regulation which outlines the procedures to be followed by the Department in the case of a discrepancy discovered during a post-election voting machine audit. Delaware spent \$13 million in 2018 on new voting machines that cast a digital vote along with a paper printout for hand recounts. Amy Cherry, *Delawareans to get 1st look at new voting machines in upcoming school board elections* WDEL 101.7FM (2019), https://www.wdel.com/news/video-delawareans-to-get-st-look-at-new-voting-machines/article_7d625346-6ddd-11e9-a2c7-4f6dfafa74af.html (last visited Mar 9, 2020). The new machines were used for the first time in May 2019 for school board elections and will be used for 2020's primary and general elections.

As a result of the purchase of the new voting machines, an Act to amend Title 15 of the Delaware Code was passed in July 2019, which established auditing requirements for the machines. The Act requires the Department to adopt regulations to govern the procedure to be used if an audit reveals a discrepancy. The proposed regulation outlines the "Threshold for Specific Action, Specific Actions to be Taken Once Threshold is Triggered, and Corrective Actions by Department to Avoid Discrepancy in the Future."

If a post-election audit process is in place, "it can inform election officials of any bugs or errors in the system, and can act as a deterrent against fraud" and "a robust post-election audit can increase confidence in the results of an election." *Post-Election Audits* (2019), <https://www.ncsl.org/research/elections-and-campaigns/post-election-audits635926066.aspx> (last visited Mar 9, 2020). As President Abraham Lincoln said, "Elections belong to the people" and being able to vote is crucial to our democratic form of government. Councils should consider supporting this regulation.

Final Regulations

2. Final Department of Education Regulation Regarding Uniform Definitions for Student Conduct Which May Result in Alternative Placement, 23 Del. Register of Regulations 751 (March 1, 2020).

GACEC generally noted that the proposed regulations were non-substantive, but did recommend that the regulation be reviewed for punctuation and other errors. The DDOE noted in the final regulation that a number of stylist and punctuation corrections were made.

Proposed Bills

HB 144- Enhanced felony for crimes against health care workers

HB 144 passed in the House on January 21, 2020, and was reported out of the Senate's Corrections and Public Safety Committee on January 29, 2020. HB 144 proposes to further broaden the statutory definition of assault in the second degree at 11 Del. C. § 612. Prior to the passage of HB 214 in 2016, an assault that would otherwise be considered a third degree assault (a misdemeanor) would automatically be considered a second degree assault (a felony) in cases where the perpetrator had recklessly or intentionally caused injury to a law enforcement officer, first responder, or public transit operator. See 11 Del. C. § 612(3)). In 2016, the Legislature passed HB 214, which expanded the automatic re-designation to assault in the second degree to include cases in which the perpetrator had intentionally caused physical injury to a "the operator of an ambulance, a rescue squad member, licensed practical nurse, registered nurse, paramedic, or licensed medical doctor while such person is performing a work-related duty," as well as "any other person... rendering emergency care." See 11 Del. C. § 612 (4)-(5).

HB 144 proposes to further expand the conditions in 11. Del. C. 612 (3)-(5), to include hospital constables, in addition to "any person providing health care treatment or employed by a health care provider which such person is performing a work-related duty." See HB 144. This language is extremely broad, and in many cases would essentially include anyone employed by a particular facility or program. Perhaps most of interest to the Councils, this would presumably include direct service professionals serving individuals with disabilities in community settings, as well as all employees at facilities such as group homes and psychiatric hospitals. Presumably the perpetrator in the vast majority of such cases would be the patient or service recipient, a person with a disability, most likely a behavioral health related disability. As second degree assault is considered a felony, the consequences could be significant for individual defendants in terms of sentencing as well as the collateral consequences of a felony conviction.

The News Journal recently published two op-eds relating to the bill. The first, by Karen Lantz, Esq. of the ACLU of Delaware and Jack Guerin of the ACLU's Coalition for Smart Justice, was recently published in the News Journal criticizing the bill, stating that it "[would

move] Delaware in the wrong direction on criminal justice reform.” They also refer to the alternative strategy of “workplace violence prevention programs” and mentions that legislation has passed in numerous other states requiring hospitals to have workplace violence prevention programs as opposed to increasing criminal penalties for assault. A rebuttal, penned by Wayne Smith of the Delaware Healthcare Association and Marcy Jack of Beebe Healthcare, contends that the strategies of workplace violence prevention and broadening the criminal statute are complementary and should be pursued together. Mr. Smith and Ms. Jack cite to statistics regarding the widespread occurrence of assaults on health care workers, and assert that not amending the statute to include all health care workers would result in a situation where workers are not equally valued, as the same incident occurring within a health care facility would be considered a felony in some cases and not in others, depending on the job title of the victim. Finally, the rebuttal article emphasizes that acts covered by subsection (4) of the statute would need to be “intentional” to be considered assault under the statutory definition, and therefore the amended statute would not unfairly target individuals experiencing a behavioral health crisis. Advocates on both sides of the issue agree that the assault of health care workers is a serious problem that the State should be working to address. It has been widely reported that approximately 75% of workplace assaults take place in health care settings. See e.g., ABC News coverage available at <https://abcnews.go.com/Health/epidemic-75-workplace-assaults-happen-health-care-workers/story?id=67685999>.

The bills’ supporters correctly point out that the acts must be “intentional” to be automatically deemed a felony under § 212(4), however they overstate how clearly this would protect individuals with behavioral health conditions from unnecessary criminalization. There is no explicit exception in the statute for individuals with disabilities or other health conditions in circumstances that may increase the likelihood of such incidents. Many individuals may be easily agitated or prone to bursts of aggression as a result of their condition, but could still legally be found to have “intentionally” caused injury to another person. Incidents involving individuals receiving inpatient care at psychiatric facilities are already often reported to police; expanding when such incidents would be considered felonies may encourage further reporting of these incidents and increasing criminalization of these individuals, as opposed to focusing on treatment and supporting the development of appropriate behaviors and coping skills.

In programs and facilities serving individuals with disabilities, inadequate staffing numbers and poor training of direct care staff often contribute to incidents escalating to the level of physical assault. Staff may not be paying sufficient attention to an increasingly agitated individual, or may not feel empowered to de-escalate conflict. In these situations, the alleged perpetrators should not face greater punishment for not receiving the appropriate care. Further, as the ACLU’s op-ed points out, alleged perpetrators of assault in these circumstances would still face consequences such as prison time or a fine for the misdemeanor charge. Saddling often vulnerable individuals with felony convictions would potentially create larger obstacles to employment as well as certain types of housing and residential programs.

There has been a push for legislation similar to that proposed by HB 144 around the country, often led by nursing unions and other trade organizations. In Massachusetts, after similar legislation was enacted, advocates proposed an amendment making it clear that any individual who was being transported or held in a psychiatric facility under the provisions of the

state's civil commitment law or has otherwise been "determined by mental health providers to need psychiatric evaluation or treatment" could not be charged with a felony under the Massachusetts statute. This bill, H.1342, was scheduled for hearing in October 2019 but does not appear to ever have been voted on.

Balancing the safety of health care workers with the rights and wellbeing of the often vulnerable individuals they serve is always a delicate balance. The DLP suggests that the Councils oppose this bill, however it is alternatively suggested that language such as that which appears in the Massachusetts bill could be introduced to further clarify that the new provisions would not apply in certain circumstances where an individual is actively receiving psychiatric treatment or other behavior related support.

HB 279- Cap on short term consumer loan and title loan interest rates

House bill 279 seeks to amend the short-term consumer loan and motor vehicle title loan statutes by imposing a limit on the interest rates that can be charged by the lender. Short term consumer loans are also known as pay day loans. They are loans of a \$1,000.00 or less, the repayment period is sixty (60) days or less, and the loans are not secured by a title to a motor vehicle.¹

Delaware is one of a majority of states that permit short-term or pay day loans. Nevertheless, Delaware is one of only a few states that impose no limit on the interest rates that can be charged. Those other states are Idaho, Nevada, South Dakota, Utah, and Wisconsin. However, there are a growing number of states that prohibit short-term high cost loans, and they include Connecticut, Maryland, Massachusetts, Pennsylvania, Vermont, West Virginia, and Washington D.C.

The synopsis to the bill mentions unconscionability that can be asserted as a defense to the high interest rate. In *James v. National Financial, LLC*, 132 A.3d 799 (Del. Ch. 2016), the court found a \$200.00 loan with an APR of 838.45% unconscionable on both procedural and substantive grounds and, therefore, unenforceable. This is an example of the short term consumer loans that are prevalent in Delaware. Unfortunately, very few are challenged in court as was done by Gloria James.

Title loans are loans that are secured by the title to the motor vehicle, the repayment period is one hundred and eighty (180) days or less, and the loan is not used to purchase the vehicle used as security.

Delaware is one of minority of states that permit title loans. These states include Alabama, Arizona, Georgia, Idaho, Texas, South Dakota, Utah, and Wisconsin. A majority of states have outlawed or prohibit title loans.

¹ See <https://www.nclc.org/images/pdf/rpt-InstallmentLoans-feb-2020.pdf> for a good explanation of the perils of short term consumer loans and other states' practices.

This bill would make limit the interest rate for both short term consumer loans and title loans to no more than 20%. While this is a major step forward, councils should recommend an even lower rate as a cap.

The average interest rate for a car loan of 60 months is 5.27%. The average APR on credit cards is 21.21%. The fixed rate for a 30 year mortgage is 3.29%. The federal discount rate is 1.75%. Against this backdrop, even 20% is extraordinarily high considering the population that avails themselves of these loans. The Court in *James* referred to these individuals as the “working poor.” This vulnerable population would not qualify for a credit card, mortgage, or car loan at competitive rates. They are forced to go to lenders that can charge whatever rate of interest they want and in the case of a title loan, the lender obtains a security interest in the vehicle, and can ultimately repossess the vehicle if the payments are not made.

While councils should consider endorsing this bill, they should also urge the Legislature to make the interest rate even lower than 20% or better still to prohibit these loans in Delaware.

HB 293 – Single Room Lease Termination

House Bill 293 proposes to amend § 5512 of Delaware’s Landlord-Tenant Code (Title 25) by allowing for the termination of single room rental agreements for any reason other than a material violation of the agreement, upon 15 days written notice. These provisions apply where the building is the primary residence of the landlord, no more than three rooms in the building are rented to tenants, and no more than three tenants occupy the building. This type of housing is frequently attractive to individuals who need quick access to housing, and/or who cannot pass credit or background checks for other types of living situations. Such individuals can include individuals who are coming out of prison or drug and alcohol rehabilitation.

As currently written, §5512 allows immediate termination upon notice to the tenant for a tenant’s material violation of the agreement. It is silent on termination for other reasons, meaning that the general notice requirements of §5106 would apply. This means that the landlord must give tenants who have not engaged in material lease violations 60 days notice to terminate.

The proposed bill’s synopsis states “this notice provision ensures that the tenant has time to find suitable housing prior to the termination of their current lease, while still permitting a landlord to quickly remove a tenant renting a single room within a house.” There is no reason given why the tenant’s right to notice is being scaled back from 60 days to 15 days. In fact, the synopsis suggests that this change is somehow of benefit to tenants, which is disingenuous to say the least. The changes would place individuals at great risk of homelessness.

Fifteen days’ notice does not provide tenants a reasonable amount of time to find new housing. The Code acknowledges the difficulty of finding new housing its provisions related to ending other rental agreements. Additionally, the scarcity of affordable housing in Delaware makes the 15 day notice requirement even more unreasonable and will make single-room renters more at-risk of becoming homeless, undermining the stability that has been achieved through stable housing. Councils should advocate that tenants renting a single room within a house should receive the same protections and rights as all other tenants.

HOUSE BILL NO. 296- Repair and Deduct for rental conditions

House bill 296 seeks to amend §5307 of the landlord-tenant code. This section of the code is commonly known as repair and deduct. It permits the tenant to repair or have repaired condition in the rental unit that the landlord fails to repair.

The original amount was established in 1996 and the last major revision of the code in 2004 left the amount untouched. While raising the amount is laudable, four hundred dollars (\$400.00) is still a very low amount considering what repairs can cost. The amount is also limited by the existing language that limits the reduction to the lesser of \$400.00 or half of one (1) month's rent. So, where the rent is \$700.00 a month for example, the limit would be \$350.00.

This piecemeal amendment falls short in this reviewer's opinion. The landlord-tenant code is badly in need of a total revision, and although CLASI participated in an effort to revise the code in its entirety, the effort was unsuccessful. While councils should endorse this bill, they should also advocate for a repair and deduct of a higher amount. One (1) month's rent, given the cost of repairs and given that more than one (1) repair may be needed, is a more appropriate amount.